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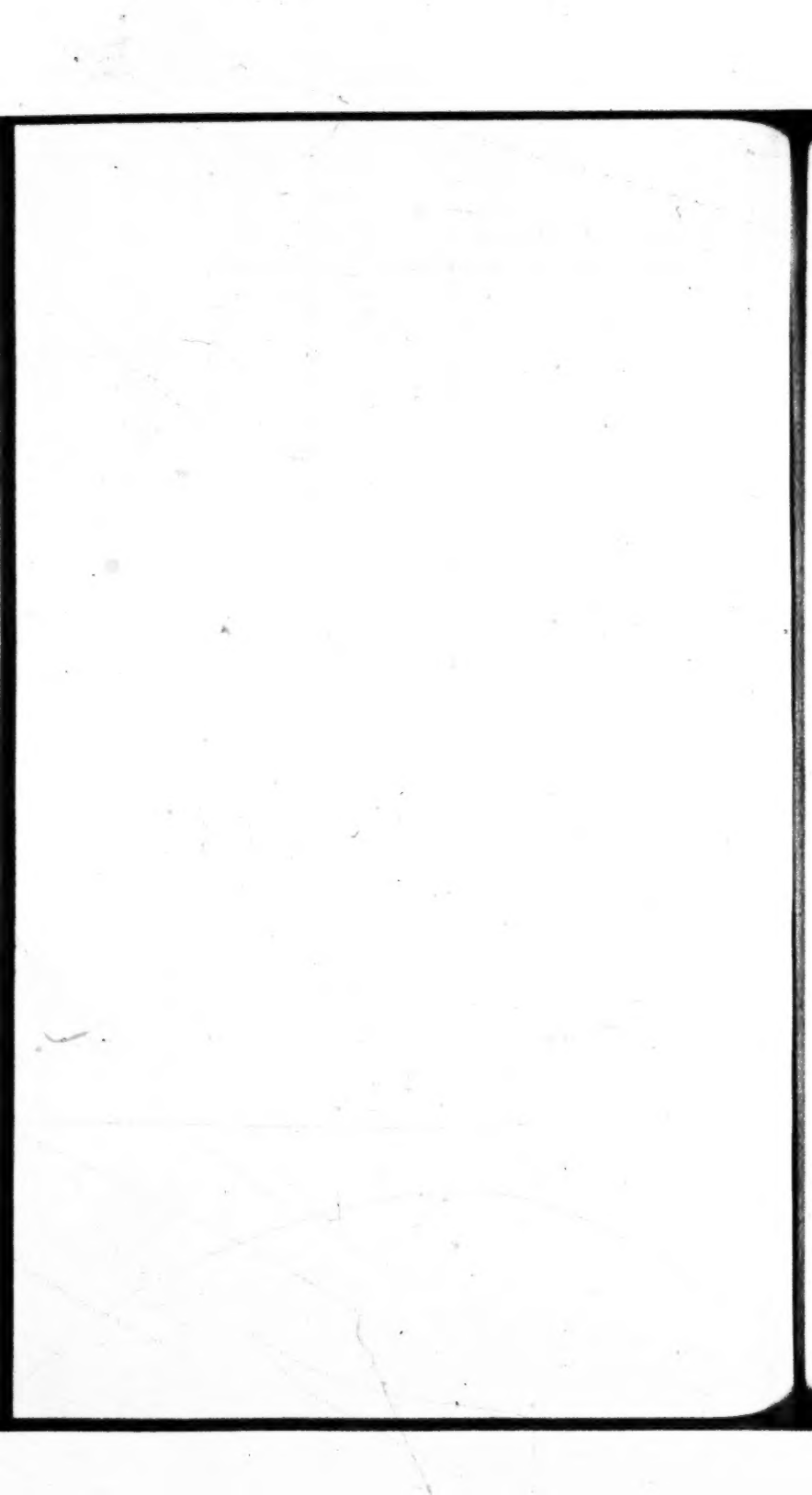
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-749

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT WILLIAM KRAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 11-26) is reported at 331 F. Supp. 1207.

JURISDICTION

The judgment of the district court declaring unconstitutional, as applied, those sections of the Bankruptcy Act which require the payment of a filing fee prior to discharge,¹ was entered on September 13, 1971

¹Section 14(b) and 14(c) of the Bankruptcy Act, 11 U.S.C. 32(b), and (c) (8), and this Court's General Order in Bankruptcy 35(4) (c), provide for the payment of the required fees as a condition to discharge in bankruptcy. The amount of the fees, totalling \$50, is specified in Sections 40(c) (1), 48(c) and 52(a) of the Act, 11 U.S.C. 68(c) (1), 76(c), 80(a).

(J.S. App. A, p. 11). A notice of appeal was filed on October 8, 1971 (J.S. App. B, p. 27) and probable jurisdiction was noted on February 22, 1972 (App. 11; 405 U.S. 915). The jurisdiction of this Court rests upon 28 U.S.C. 1252.

QUESTION PRESENTED

Whether the provisions in the Bankruptcy Act requiring the payment of a \$50 filing fee as a precondition to discharge in voluntary bankruptcy proceedings are unconstitutional as applied to an indigent bankrupt unable to pay the fee.

STATUTE AND ORDER INVOLVED

The pertinent provisions of the Bankruptcy Act, 11 U.S.C. 1 *et seq.*, and of this Court's *General Order in Bankruptcy* No. 35, 331 U.S. 873, 876, are set forth in the Appendix, *infra*, pp. 29-32.

STATEMENT

Appellee Robert Kras filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York on May 28, 1971. Accompanying the petition was an affidavit stating that appellee was indigent, and a motion for leave to proceed without payment of the filing fees required as a precondition to discharge by the Bankruptcy Act, 11 U.S.C. 1 *et seq.* (App 3-6).² In the affidavit, ap-

² The fees include \$37 for the referees' salary and expense fund, \$10 for the compensation of trustees, and \$3 as a filing fee. Sections 40(c)(1), 48(c) and 52(a) of the Bankruptcy Act, 11 U.S.C. 68(c)(1), 76(c), 80(a). The Act permits the filing of a petition if the petitioner agrees to pay in installments; this Court's *General Order in Bankruptcy* No. 35(4)(a) authorizes installments over a six-month period, with three-month extension of this time for cause shown.

pellée alleged that he supported his wife, two children, mother and his mother's small child on semi-monthly public assistance allowances of \$183; that he had not been regularly employed since May, 1969; that he had no assets except \$50 in exempt clothing and household goods; and that he was "wholly unable to pay or promise to pay the filing fees, even in small installments * * * " (App. 4, 5).

Appellee contended that the *in forma pauperis* statute (28 U.S.C. 1915) created an exception for indigents to the filing fee requirements of the Bankruptcy Act and that, if it did not, the latter requirements were unconstitutional as applied to him (App. 4). The United States intervened to defend the constitutionality of the filing fee requirements (App. 7).

The district court held that "as applied to petitioner herein, the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violates the Fifth Amendment right of due process, including equal protection" (J.S. App. A, p. 21). While rejecting the contention that the federal *in forma pauperis* statute, 28 U.S.C. 1915(a), applies to bankruptcy proceedings, the court held that a discharge in bankruptcy was a "fundamental interest," which could not be denied unless a "compelling government interest was shown." The court ruled that the congressional determination to make the bankruptcy system self-sustaining was not a compelling interest. The court ordered the petition filed and directed the referee to

"make provision for the survival of petitioner's obligation to pay the filing fee" (J.S., App. A, p. 23).³

SUMMARY OF ARGUMENT

I

To carry out its intention that the cost of operating the federal bankruptcy system be borne by those who make use of bankruptcy services, rather than the public at large, Congress established fixed fees applicable to all bankruptcy filings. The Bankruptcy Act of 1898 permitted a voluntary bankrupt to file his petition without paying these fees if he submitted an affidavit that he was without the means to pay them. In 1946, Congress determined that these pauper petitions had been abused and should be abolished. It made payment of the fees a precondition to discharge, but provided that indigents be permitted to file their petitions and pay the fees in installments as prescribed in the *General Orders in Bankruptcy*. The fee of \$50 may now be spread over as long as nine months, at a weekly rate of \$1.28.

A. The district court applied an erroneous standard in concluding that the constitutionality of the fee requirement could be sustained against an Equal Protection challenge only upon a showing of a "compelling government interest." This standard of review is appropriate in cases in which the challenged classification impinges on a fundamental constitutional right. When, however, all that is at issue is a condition

³ The case was subsequently assigned to a referee in bankruptcy, who conducted the proceedings but stayed the issuance of a discharge pending disposition of this appeal (App. 9-10).

attached to a legislatively created benefit in the social and economic sphere, the appropriate standard of review is simply whether the classification has some reasonable basis.

The Bankruptcy Act was enacted by Congress pursuant to its plenary power over bankruptcy. The provision for a voluntary petition for a discharge in bankruptcy was designed to facilitate the operation of the Bankruptcy Act and to give debtors economic assistance. The legislation is akin to similar legislation in the social and economic sphere. Accordingly, the fee provisions do not violate the Fifth Amendment unless they have no reasonable basis.

B. The district court implicitly recognized, as have other courts, that it is reasonable for Congress to impose a minimal fee to cover the cost of processing a debtor's application for a discharge. Moreover, Congress has demonstrated a particular concern for indigent debtors by permitting them to file petitions without payment of the fee, thereby obtaining relief from creditor harassment and preserving assets acquired after filing the petition, while allowing up to nine months to pay the \$50 fee. The provisions were the product of experience under an earlier statute which demonstrated that many pauper petitions involved a misstatement of the debtor's financial condition or that given a reasonable period of time most assetless debtors could pay the fee. The provision is reasonable and does not deny an indigent debtor equal protection.

C. The district court incorrectly relied on *Boddie v. Connecticut*, 401 U.S. 371, in striking down the fee

requirement. In *Boddie*, this Court held unconstitutional, as applied to an indigent, a State requirement that filing fees be paid before a divorce suit could be instituted. It reasoned that since the state compelled those seeking to dissolve their marriages to resort to judicial proceedings, they were deemed to be in the same position as defendants who are compelled by law to defend their rights in court; therefore, they could not be deprived because of indigency of a full opportunity to be heard on their claimed right to a dissolution of "a fundamental human relationship" (401 U.S. at 383).

Where, however, as here, the debtor is not legally compelled to resort to the judicial process but merely selects that method as the means of terminating a debtor-creditor relationship, Congress may impose conditions reasonably related to a legitimate legislative purpose even when, as a result, "some are denied access" to the judicial process. *Boddie v. Connecticut*, *supra*, 401 U.S. at 376. Moreover, the right to a discharge in bankruptcy is not as fundamental as the right to a divorce involved in *Boddie*.

II

The district court correctly held that the federal *in forma pauperis* statute, 28 U.S.C. 1915(a), is inapplicable to bankruptcy proceedings. Despite the existence of a general federal *in forma pauperis* statute when the bankruptcy statute was enacted in 1898, Congress wrote a specific provision for pauper petitions into the Bankruptcy Act. The legislative history surrounding the repeal of that provision in 1946,

and the express requirement in the Bankruptcy Act that fees be paid prior to discharge, even if in installments, shows that Congress did not intend the general *in forma pauperis* statute to apply to bankruptcy proceedings.

ARGUMENT

I. THE \$50 FILING FEE REQUIREMENT OF THE BANKRUPTCY ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Prior to 1946, the administration of the bankruptcy laws was financed by a fee system under which each referee met the expenses of his office and obtained his compensation out of the fees and charges he collected. The Bankruptcy Act permitted a debtor to file a petition in bankruptcy and obtain a discharge without paying any fees, if he filed an affidavit that he was unable to pay them. Over the years, however, there developed a "practice" by referees of permitting such petitions to be filed without payment, but then insisting and obtaining the payment of the fees, often in installments, before granting a discharge. S. Rep. No. 959, 79th Cong., 2d Sess., p. 2; H. Rep. No. 1037, 79th Cong., 1st Sess., p. 6.

In 1946 Congress abolished these "pauper petitions" and provided, "in lieu of the present widespread practice of demanding payment ultimately" (S. Rep. No. 959, *supra*, p. 7; H. Rep. No. 1037, *supra*, p. 6), for the "creation of a national expense fund, [which] will put the financing upon a national basis designed to be self-sustaining as under the present act (S. Rep. No. 959, *supra*, p. 2). The legislation included a new schedule of uniform bankruptcy fees and charges created separate

referees' salary and expense funds in the Treasury, into which the fees and charges would be paid.* It also permitted fees to be "paid in installments if so authorized by General Order of the Supreme Court of the United States" (11 U.S.C. 68(a)).

The latter provision was implemented in *General Order in Bankruptcy* No. 35(4), which provides that a voluntary petition in bankruptcy may be filed without payment of the filing fee if the petition is accompanied by an affidavit of indigency setting forth the terms upon which the bankrupt proposes to pay the fee.⁵ The General Order further requires that, following the first meeting of creditors, the court shall enter an order fixing the amount and date of payment of each installment. The fee must be paid within six months unless extended for cause for an additional three months.

Since 1967, the Bankruptcy Act has required the payment of three separate fees, aggregating \$50: \$37 to the referees' salary and expense fund, Section 40(c) (1), 11 U.S.C. 68(c) (1); \$10 for the compensation of the trustee, Section 48(c), 11 U.S.C. 76(c); and \$3 to the clerk of the court as a filing fee, Section 52(a), 11 U.S.C. 80(a). If paid in installments over a six-month period, the fees amount to \$1.92 per week; if extended to nine months upon a showing of cause, the fee is \$1.28 per week.

The district court held that these fee provisions, as applied to respondent (whose financial situation, it

* The separate funds were consolidated in 1952. P.L. 457, 82d Cong., 2d Sess., 66 Stat. 438.

⁵ *Amendments of General Orders in Bankruptcy*, 331 U.S. 873, 876.

believed, made him indigent, J.S. App. A, 12-13, 22), violated his "Fifth Amendment right of due process, including equal protection" (*id.*, 21). The court held that, since access to the bankruptcy^{Court} involves "a fundamental interest," the constitutionality of conditioning such access upon the payment of the \$50 fee depends upon whether the requirement promotes a "compelling government interest" (*id.*, 24-25); it ruled that "the Government's fiscal interest in supporting the bankruptcy system" (*id.*, 23) does not satisfy that standard.

The basic error of the district court was its conclusion that the \$50 filing fee is constitutional only if it is justified by "a compelling government interest." Although the "compelling governmental interest" standard is significant in testing the constitutionality of "otherwise valid government regulation" that "im-pinge[s] upon activity protected by the First Amendment" or upon other fundamental constitutional rights, it is now settled that government "regulation in the social and economic field" is valid "[i]f the classification has some 'reasonable basis'" (*Dandridge v. Williams*, 397 U.S. 471, 484-485; *Richardson v. Belcher*, 404 U.S. 78, 81).

Bankruptcy administration does not involve a regulation which impinges upon a fundamental right, but is akin to legislation in "the social and economic field." The \$50 fee is constitutional because it has a reasonable basis: it reflects the valid Congressional purpose of making the administration of the Bankruptcy Act, as far as possible, financially self-sufficient.

A. THE CONSTITUTIONALITY OF THE \$50 FILING FEE DEPENDS UPON WHETHER IT HAS A REASONABLE BASIS AND NOT UPON WHETHER IT IS JUSTIFIED BY A COMPELLING GOVERNMENT INTEREST

1. While the Fifth Amendment does not contain an equal protection clause, it forbids discrimination that is "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499; *Schneider v. Rusk*, 377 U.S. 163, 168; *Shapiro v. Thompson*, 394 U.S. 618, 642. The determination whether the discriminatory aspect of legislation violates the Fifth Amendment depends largely upon the nature of the legislation and the effect which a challenged classification may have on the exercise of fundamental constitutional rights.

Where Congress has legislated in the social and economic sphere, classifications conditioning the right of an individual to obtain statutory benefits will be sustained "unless the statute manifests a patently arbitrary classification, utterly lacking rational justification." *Fleming v. Nestor*, 363 U.S. 603, 611; *Dandridge v. Williams*, 397 U.S. at 485; *Richardson v. Belcher*, 404 U.S. 78, 81. Where, however, the classification tends to discourage or infringe upon the exercise of a fundamental constitutional right, the classification can be justified only upon a showing of a "compelling government interest." *Shapiro v. Thompson*, 394 U.S. 618, 638; *Harper v. Virginia Board of Elections*, 383 U.S. 663; *Bullock v. Carter*, ~~No.~~ 405 U.S. 134.*

* Also requiring justification by a showing of a "compelling government interest" are those classifications involving so-called "suspect criteria, such as race, nationality and alienage." *Graham v. Richardson*, 403 U.S. 367, 375. This special category

The district court's use of the "compelling interest" standard, in reliance upon *Shapiro v. Thompson*, 394 U.S. 618, in determining the constitutionality of the \$50 bankruptcy filing fee was unwarranted. *Shapiro v. Thompson* involved the validity of legislation of several States and of the District of Columbia, which denied welfare assistance to residents who met all other eligibility requirements except that they had not resided within the particular jurisdiction for at least a year. The purpose of the classification based on duration of residence was to discourage migration by indigent persons into the States and the District of Columbia (394 U.S. at 628). The Court held that it was not enough that there was a rational relationship between the classification and the permissible objects of the legislation because the classification infringed

is rooted in the history of the Equal Protection Clause of the Fourteenth Amendment. As the Court observed in *McLaughlin v. Florida*, 379 U.S. 184, 189-192, "classifications based upon race must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states. This strong policy renders racial classifications 'constitutionally suspect' * * * and subject to the most rigid scrutiny." See also *Harper v. Virginia Board of Elections*, 383 U.S. 663, 682, n. 3 (Harlan, J. dissenting). While there are dicta in *McDonald v. Board of Elections*, 394 U.S. 802, 807, to the effect that classifications based on wealth as well as those based on race are "suspect", no case has applied the compelling interest standard to classifications, other than those involving "race, nationality and alienage," where the classification did not infringe upon a fundamental constitutional right. Cf. *James v. Valtierra*, 402 U.S. 137, which upheld what the dissenting opinion described as "an explicit classification on the basis of property" (402 U.S. 144-45) similar to that which had been *sh* when the classification was based on race (*Hunter v. Erickson*, 393 U.S. 385).

upon the "constitutional right to travel from one State to another" (394 U.S. at 630, quoting from *United States v. Guest*, 383 U.S. 745, 757-759).

Other cases that have applied the "compelling interest" test similarly involved restrictions upon basic constitutional rights. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670, invalidated a poll tax which infringed the right to vote, a right "too precious, too fundamental to be so burdened." *Bullock v. Carter, supra*, struck down a prohibitively high filing fee intended to reimburse the state for the cost of conducting a primary election; the Court held that the requirement infringed the right to hold public office and denied "voters the opportunity to vote for candidates of their choice" (405 U.S. at 149). *Smith v. Bennett*, 365 U.S. 708, 712, condemned a court filing fee which infringed upon the right of a prisoner to file a petition for a writ of habeas corpus, a remedy "considered by the Founders as the highest safeguard of liberty" and protected by Article I, § 9 of the Constitution.⁷ See also, *Graham v. Richardson*, 403 U.S. 365, 375; *Dunn v. Blumstien*, No. 70-13, decided March 21, 1972.

⁷ The decision in *Smith v. Bennett* is one of a series of holdings in cases involving the rights of indigent defendants in criminal proceedings. Relying upon the Due Process Clause as well as the Equal Protection Clause, these cases hold that persons compelled by the State to defend their life and liberty in criminal proceedings must be accorded equal access to remedies afforded by the State to non-indigents in the same situation. *Griffin v. Illinois*, 351 U.S. 12, 18; *Douglas v. California*, 372 U.S. 353; *Draper v. Washington*, 372 U.S. 487; *Lane v. Brown*, 372 U.S. 477; *Eskridge v. Washington*, 357 U.S. 214.

The requirement in the Bankruptcy Act that a bankrupt must pay a \$50 fee in order to obtain a discharge—although disfavoring indigents—does not infringe upon any of their fundamental constitutional rights. There is no constitutional right to obtain a discharge of one's debts in bankruptcy. Article I, Section 8, Clause 4 of the Constitution merely authorizes Congress "to establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." The right of a debtor to file a voluntary petition in bankruptcy and obtain a discharge of his debts was unknown at the time of the adoption of the Constitution. Indeed, prior to the present Bankruptcy Act, passed in 1898, the nation was without a federal bankruptcy law except for three short periods.*

The discharge of a bankrupt's debt was initially provided as a means of inducing bankrupts to make full disclosure and delivery of their assets. "The later development of the discharge represents an independent though not unrelated public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse" (MacLachlan, *Bankruptcy*, 88). The concept of a discharge thus resulted from a legislative determination to provide a particu-

* An early Act, which did not permit voluntary petitions and conditioned discharge on the consent of creditors, was passed in 1800 and repealed in 1803. 2 Stat. 19, c. 19; 2 Stat. 248, c. 6. A second Act permitting voluntary bankruptcies was passed in 1841 and repealed in 1843. 5 Stat. 440, c. 9; 5 Stat. 614, c. 82. A third Act was passed in 1867 and repealed in 1878. 14 Stat. 517, c. 176; 20 Stat. 99, c. 160. The unrestricted use of voluntary petitions was authorized only after it became apparent that the restrictions on such petitions were easily evaded by collusion between debtors and friendly creditors. MacLachlan, *Bankruptcy*, 88.

lar type of financial aid to debtors. The "fundamental interest" which the district court perceived in the right to obtain a discharge in bankruptcy involves only a legislatively created benefit. See *In re Garland*, 428 F. 2d 1185, 1188 (C.A. 1), certiorari denied, 402 U.S. 966; cf. *Boyden v. Commissioner of Patents*, 441 F. 2d 1041 (C.A.D.C.), certiorari denied, 404 U.S. 842.

In any event, the decisions of this Court make clear that Congress has the power to attach reasonable conditions to statutorily-created benefits and that no compelling interest need be shown to justify such conditions regardless of the significance of the benefit accorded.* Particularly apposite here is *Dandridge v. Williams*, 397 U.S. 471, which involved the validity of a State statute limiting the amount any single family could receive in welfare benefits. Although, unlike

* The fact that Congress delegated to the district court supervision over the non-adversary proceedings by which petitions for a discharge are processed, does not, as the court below suggested, convert a statutory privilege, into a fundamental constitutional right of access to a court. Surely the problem presented here would be no different if Congress had simply delegated the responsibility for the administration of the Bankruptcy Act to an administrative agency. Compare *Levy v. Louisiana*, 391 U.S. 68, with *Weber v. Aetna Casualty Co.*, No. 70-5112, decided April 24, 1972. The decisions of this Court involving limitations placed upon the right of individuals to assert legal claims have always turned on whether the restrictions imposed were rationally related to a legitimate legislative purpose. *Silver v. Silver*, 280 U.S. 117; *Levy v. Louisiana*, 391 U.S. 68; *Glon v. American Guaranty Liability Co.*, 391 U.S. 73; *Cohen v. Beneficial Finance Corp.*, 337 U.S. 541; cf. *W. B. Worthen Co. v. Thomas*, 292 U.S. 426. The restrictions were never viewed as limitations upon a fundamental right of access to the court necessitating a showing of a compelling government interest. Only a rational basis for the classifications was required. Cf. *Labine v. Vincent*, 401 U.S. 532.

Shapiro v. Thompson, supra, the limitation in *Dandridge* did not discourage or infringe upon the exercise of any constitutional right, it was contended that welfare payments were so important to the recipient that the limitation could be sustained only upon a showing of a "compelling government interest." While recognizing that the welfare benefits "involved the most basic economic needs of impoverished individuals," the Court nevertheless declined to apply that test in determining the validity of the statute under the Equal Protection Clause, and instead upheld the statute because it had a "reasonable basis" (397 U.S. at 485). The Court said (*ibid.*):

To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. * * * ¹⁰

Similarly in *Richardson v. Belcher, supra*, the Court sustained the provision of the Social Security Act that requires a reduction in benefits to reflect workmen's compensation payments. The Court held that there was a "rational basis" for the classification, which it stated is the governing standard "in the

"The Court distinguished *Shapiro v. Thompson, supra*, on the ground that the legislation there involved "interference with the constitutionally protected freedom of interstate travel." 397 U.S. at 484, n. 16.

area of social welfare" legislation for determining its constitutionality under Equal Protection standards (404 U.S. 81, 82). See also, *Lindsey v. Normet*, 405 U.S. 56, 73-74; *Jefferson v. Hackney*, No. 70-564, decided May 30, 1972.

The right of an assetless debtor to obtain a discharge in bankruptcy hardly approaches in significance or importance the benefits involved in cases such as *Dandridge v. Williams*, *supra*, nor does it involve an interest by the recipient of a benefit as substantial as that in *Richardson v. Belcher*, *supra*. The standards applied in those cases are applicable here. See, *In re Garland*, *supra*, 428 F. 2d at 1188.

B. THE \$50 FEE REQUIREMENT HAS A REASONABLE BASIS AND DOES NOT INVOLVE ANY INVIDIOUS DISCRIMINATION AGAINST INDIGENTS

The plenary power over the subject of bankruptcy, which Article I, Section 8 of the Constitution gives Congress, *Kalb v. Feuerstein*, 308 U.S. 433, 438-39, permits Congress to "embrace within its legislation whatever may be deemed important to a complete and effective bankruptcy system." *United States v. Fox*, 95 U.S. 670, 672; see *Wright v. Union Central Insurance Co.*, 304 U.S. 502, 513-514; *Hanover National Bank v. Moyses*, 186 U.S. 181. Congress has the power to determine whether or not there shall be bankruptcy laws, to limit the right to seek bankruptcy to particular classes of persons, and to "prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law." *Hanover National Bank v. Moyses*, *supra*, 186 U.S. at 192; cf. *Continental Illinois Bank v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S.

648, 669-671; *Kuehner v. Irving Trust Co.*, 299 U.S. 445.

Congress had a reasonable basis for requiring the payment of the \$50 fee as a condition of obtaining a discharge in bankruptcy. The requirement was imposed against the background of the practice under which referees in bankruptcy, whose compensation and expenses were paid out of the fees they received, accepted so-called "pauper" petitions without the payment of any fees, but subsequently insisted upon their payment before they would grant a discharge. See *supra*, pp. 7-9. The fact that so many allegedly indigent bankrupts actually were able to find the money to pay the fees indicated either that their affidavits of indigency were false or that they subsequently became able to pay the fee once the petition in bankruptcy had been filed.¹¹

In the 1946 amendments to the Bankruptcy Act, Congress determined to end these practices that had

¹¹ In several recent cases involving challenges to the constitutionality of the bankruptcy fee provisions, the petitioners—*notwithstanding affidavits of poverty*—have been able to pay the fees. In *In re Miller*, the district court upheld the fee requirement. On appeal to the Sixth Circuit, No. 20,059, that court remanded for further findings on indigency; the district court then found that, notwithstanding the affidavit of indigency, the petitioner could pay the fees. *In re Miller*, E. D. Mich., No. 71-8002, decided December 16, 1971. The Administrative Office of the United States Courts has advised us of two other instances in which payment was made under similar circumstances despite the filing of affidavits of indigency. In *In re Morris*, D. Ore., No. B60-2537, the petitioner paid her fee and dismissed her appeal after the referee rejected her challenge to the fee; and in *In re Hickey*, N.D. Miss., Civil No. DBk71-52, likewise became moot when the petitioner obtained a job and paid the filing fees.

previously existed in the use of the pauper petitions and to make the financing of the administration of the bankruptcy laws "self-sustaining." S. Rep. No. 959, 79th Cong., 2d Sess., p. 2. In addition to abolishing the pauper petitions, Congress provided two new sources of revenue for administering the bankruptcy laws: the payment of fixed fees for every bankruptcy petition filed, and the payment of a fixed percentage of all distributable assets. Congress thus determined that the expenses of bankruptcy administration should be borne by those who use the system, rather than by the public at large. See H. Rep. No. 1037, 79th Cong., 1st Sess., pp. 4, 5-6.¹²

The district court in the present case—as well as the two other courts that have invalidated the fee as a condition to discharge—have recognized the propriety of requiring the payment of the fee. For they have provided that the \$50 remains a debt of the bankrupt that is not discharged and which must be paid if and when the bankrupt obtains the funds. (J.S. App. A, p. 23); *In re Smith*, 323 F. Supp. 1082 (D. Col.) *Application of Ottman*, 336 F Supp. 746 (E.D. Wisc.)). But the deter-

¹² This decision to charge the users of the system continued a policy that had been reflected in the several bankruptcy statutes enacted since 1800. The first national bankruptcy statute was enacted in 1800, and provided only for involuntary proceedings. The fees involved were paid by the bankrupt's creditors, 2 Stat. 19, c. 19. In 1841, a new bankruptcy statute authorized the district courts to prescribe the charges for the services provided. Act of 1841, ch. 9, § 6, 5 Stat. 440. The Act of 1867 provided for certain fees and gave this Court the authority to establish others. Act of 1867, ch. 176, §§ 10, 47, 14 Stat. 517. The tests of the older statutes are set forth in 10 *Collier on Bankruptcy*, Appendix, p. 1671.

mination of the manner in which a particular legislative policy is to be implemented—here the payment of a fee as a condition to discharge—is for the Congress and not the courts to make.

The provisions for the payment of the \$50 fee, as implemented by General Order in Bankruptcy, No. 35(4), are reasonable. An indigent debtor is permitted to file his petition in bankruptcy without payment of any fee. He therefore obtains the advantage of insulating from his creditors assets acquired from the date of the filing of the petition (11 U.S.C. 110),¹³ while being allowed up to nine months to obtain the money to pay the fee. During this period he is also effectively freed from creditor harassment (MacLachlan, *Bankruptcy*, 98).¹⁴ Congress could properly

¹³ The only property acquired after the filing of the petition to which the trustee takes title is that acquired by device, bequest or inheritance within six months after the filing of the petition, and property in which the bankrupt had at the time of filing an estate or interest by the entirety and which within six months of filing becomes transferable in whole or in part solely by the bankrupt. 11 U.S.C. 110(a); MacLachlan, *Bankruptcy*, 178-81.

¹⁴ Pursuant to 11 U.S.C. 29(a) the bankrupt may obtain a stay of all actions pending at the time of the filing of the petition which seek to enforce claims which would be subject to discharge. The provision has been held applicable to supplementary proceedings on a judgment, levy of execution, garnishment, or proceedings to arrest a bankrupt on civil process out of a state court arising on a dischargeable claim (1A Collier, *Bankruptcy*, 11.03, p. 1143, 11-45 and cases cited). The district court is also empowered to issue similar stays with respect to lawsuits commenced after the filing of the petition (11 U.S.C. 11(a)(15); see 1 Collier, *Bankruptcy*, 2.62, p. 338-341).

conclude that if a debtor could not foresee any possibility of obtaining \$50 in that period, he could simply delay filing the petition until his prospects for future earnings increased and the discharge becomes meaningful. The procedure reflects a concern for the rights of assetless debtors, while at the same time furthers a reasonable legislative policy. Cf. *Bullock v. Carter*, *supra*, 405 U.S. at 149. This is not invidious discrimination. See, Michelman, *The 1966 Supreme Court Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 19-20.

The elimination of the \$50 filing fee for indigents would substantially eliminate any possibility of accomplishing the Congressional purpose, which underlay the legislative determination to adopt the fee system in 1946, of making the administration of the bankruptcy laws financially self-sufficient. See *supra*, pp. 7-9. The most recent statistics show that of the 169,500 non-business bankruptcies terminated in 1969, more than 64 percent (107,481) were cases in which the bankrupt had no non-exempt assets but ultimately paid the fee. Administrative Office of the United States Courts, *Tables of Bankruptcy Statistics* (1969). The loss to the Referees' Salary and Expense Fund if filing fees cannot be required for indigents has been estimated at \$3 million annually (see *In re Garland*, *supra*, 428 F. 2d at 1188). Even if that figure were actually somewhat lower, it is clear that the Congressional objective of making the bankruptcy system self-supporting would be defeated.¹⁵

¹⁵ The fact that rising administrative costs and referee salaries have resulted in increasing operating deficits in the bankruptcy

C. BODDIE V. CONNECTICUT IS INAPPLICABLE

The district court relied heavily upon *Boddie v. Connecticut*, 401 U.S. 371, in holding the \$50 filing fee requirement unconstitutional. *Boddie* held unconstitutional, under the Due Process Clause, a Connecticut statute requiring the payment of a filing fee in order to institute a divorce action, as applied to indigents unable to pay the fee. In his motion to affirm, appellee relies almost entirely on *Boddie*, which he interprets as establishing that the \$50 filing fee violates the Due Process Clause; he makes no contention that the requirement denies him equal protection.

Contrary to the views of the district court and appellee, we submit that *Boddie* does not control this case and that neither its holding nor its reasoning invalidates the \$50 filing fee requirement in bankruptcy.

system (J.S. App. A 23-24), merely serves to emphasize rather than diminish the importance of maintaining a source of revenue which Congress deemed significant to the fiscal integrity of the bankruptcy system. Whether the fee should be totally eliminated or whether it should be retained along with a continuing subsidy from the general revenues is a decision Congress must make. The Administrative Office of the United States Courts recommended, in March 1969, that the self-financing aspect of the bankruptcy law be abolished. Legislation to that effect was introduced in the 91st Congress, 1st Session (S. 1394; H.R. 4816) but did not pass. S. 1394 passed the Senate in the current session and is pending in the House. The legislation is briefly discussed in S. Rep. No. 612, 92d Cong., 2d Sess. Congress has also recently created a Commission on the Bankruptcy Laws of the United States to investigate the operation of the bankruptcy system. P.L. 91-354, 91st Cong., 2d Sess., 84 Stat. 468. The report of that commission is due in June, 1973. See S.J. Res. 190, 92d Cong. 2d Sess.

The plaintiffs in *Boddie*, who were forced by the State to resort to its courts in order to obtain a divorce, were found to be in the same position and entitled to the same due process rights accorded defendants in civil cases who are likewise compelled to defend their legal rights in court. Drawing upon principles applicable to the rights of such defendants, the Court held that "the state's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of sufficient countervailing justification for the State's action, a denial of due process" (401 U.S. at 380).

The justification offered for the filing fee in *Boddie* was that it was necessary to effectuate a policy against frivolous litigation and to cover the costs of the proceeding. The Court found that the filing fee did not have any significant relation to discouraging frivolous lawsuits and that other means were available to accomplish that objective. Relying upon *Griffin v. Illinois*, 351 U.S. 12, which struck down a limitation on the right of an indigent criminal defendant to equal access to the remedies made available by the State, the Court held that the State's interest in resource allocation and cost recoupment was insufficient to justify the limitation (401 U.S. at 382).

The Court stated, however (401 U.S. at 382-383):

* * * We do not decide that access for all individuals to the courts is a right that is, in all

circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

The discharge of a person's debts through bankruptcy cannot be equated to a divorce proceeding. Unlike the dissolution of a marriage, which may be obtained only through a judicial proceeding, a discharge in bankruptcy is only one of the ways of dissolving the debtor-creditor relationship. The parties may agree on a method of repaying or compromising the debt or the creditor may discharge the obligation formally or simply by not pursuing his legal remedies until they become time-barred. Debts thus may be discharged without invoking bankruptcy proceeding and, unlike the situation with respect to a marriage, the government has not "pre-empted the right to dissolve this legal relationship without affording all citizens access to the means it has presented for so doing" (401 U.S. at 382).

It has been suggested, however, that as a practical matter, resolution of a particular dispute by the par-

ties themselves may be impossible and that under those circumstances "the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force." Mr. Justice Black, dissenting from the denial of certiorari in *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 957; see, also Mr. Justice Brennan, dissenting in *Boddie v. Connecticut*, *supra*, 401 U.S. at 387. While this may be true, we submit that the distinction between cases in which litigants are forced by the State to have their rights resolved through the judicial process and cases in which they simply choose that route to resolve irreconcilable disputes is at least sufficient to warrant a different standard in reviewing the conditions placed upon the ~~existence~~^{exercise} of legislatively-created rights.

Where the State does not require a party to invoke the judicial process but merely makes available a forum for the resolution of a dispute, it can attach reasonable conditions even though they have the effect of denying some persons access to the courts. *Boddie v. Connecticut*, *supra*, 402 U.S. at 376. In *Cohen v. Beneficial Finance Corp.*, 337 U.S. 541, the Court upheld a state law requiring a shareholder who owned less than 5 percent of the corporation's stock or whose stock was worth less than \$50,000, to post security for costs before he could bring a stockholder's derivative suit. The Court stated (337 U.S. at 552):

It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for

the payment of any kind of costs, or the necessity for bearing any kind of expenses of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.

The Court recently distinguished *Cohen* on grounds that recognized the power of the legislatures to impose reasonable conditions upon someone seeking to invoke the judicial process to settle a dispute. In *Lindsey v. Normet, supra*, 405 U.S. at 74-79, the Court struck down an Oregon statute requiring that tenants seeking to appeal eviction orders post a bond equivalent to twice the rental value of the premises from the commencement of the action until final judgment, *in addition* to the ordinary appeal bond. The Court held that the requirement for a double bond was an "arbitrary" device which made it impossible for poor defendants to appeal "no matter how meritorious their cases may be" (405 U.S. at 79). It distinguished *Cohen* on the ground that "the security requirement there applied to a *plaintiff*" and had a reasonable basis (405 U.S. at 79, emphasis in original). Cf. *Boddie v. Connecticut, supra*, 401 U.S. 381, n. 9; *Chidsey v. Guerin*, 443 F. 2d 584 (C.A. 6).

Moreover, the right to a discharge in bankruptcy, important though it may be, does not involve an interest as fundamental as that involved in *Boddie*. The Court there indicated that it was significant that the State had pre-empted the right to dissolve the "fundamental human relationship" of marriage (401 U.S. at

383). But a discharge of the debts of an assetless debtor is not of the same level of fundamental importance as a divorce, which involves at the very least the right of the parties to remarry (cf. *Loving v. Virginia*, 388 U.S. 1, 12). As the Court of Appeals for the First Circuit observed *In re Garland*, 428 F. 2d at 1188:

The primary question must be why an individual admitting no assets has need for a discharge. If he has nothing, or if whatever he has is exempt under 11 U.S.C. § 24, it would seem that his creditors would find it pointless to pursue him. If they should pursue, one would wonder what the debtor could have to be concerned about. We can think of only two classes of seemingly assetless persons who might want a discharge: those who in fact have assets, but hope to conceal them, and those who have none, but, as present petitioners claim for themselves, expect future assets, and wish to be rid of their creditors first. The first category deserves, of course, no consideration. We do not think the claim of the second so compelling that they must be constitutionally entitled to a free discharge.

Ordinarily the denial of a petition for certiorari imports nothing with respect to the merits of the decision denied review. But the denial of certiorari in *Garland*, coming only two months after the decision in *Boddie* and in light of the strong dissenting opinions of Mr. Justice Black and Mr. Justice Douglas, both of whom would have reversed *Garland* on the authority of *Boddie* (402 U.S. 954, 960), suggests that the Court did not regard *Boddie* as extending to invalidate the \$50 filing fee requirement in bankruptcy. This conclusion is in accord with the state-

ment in *Boddie*, quoted *supra*, pp. 22-23, that "[w]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment * * *." Cf. *Frederick v. Schwartz*, 402 U.S. 937, vacating and remanding for reconsideration in light of *Boddie* an order of a three-judge court upholding a filing fee in cases involving appeals from administrative agency decisions.

II. THE FEDERAL IN FORMA PAUPERIS STATUTE, 28 U.S.C. 1915(a), IS INAPPLICABLE IN BANKRUPTCY PROCEEDINGS

Appellee contended below and in his motion to affirm (p. 2) that the federal *in forma pauperis* statute, 28 U.S.C. 1915(a), is applicable to proceedings in bankruptcy and that it entitles him to file his petition and obtain a discharge without payment of costs. The district court correctly rejected this argument.

The Bankruptcy Act not only makes payment of the fee a condition to discharge (11 U.S.C. 32(b)(2) and 32(c)(8)), but Congress in the 1946 Amendments eliminated the pauper filings which were formerly permitted under Section 51(2) of the Bankruptcy Act of 1898, and substituted an installment method of payment for indigent petitioners (11 U.S.C. 68(c)(1)).¹⁸ The legislative history of the amended statute shows that Congress intended to "abolish the [so-called] pauper petitions" and "to provide for installment payments in meritorious cases." S. Rep. No. 959, *supra*, at p. 7.

¹⁸ Despite the existence of a general federal *in forma pauperis* statute (27 Stat. 252 (1892)), Congress thought it necessary to write a specific provision for pauper petitions into the Bankruptcy Act of 1898.

In the light of this clear and explicit Congressional purpose to eliminate pauper petitions, Congress showed that it did not intend to allow bankrupts to continue to follow that terminated practice by proceeding under the general *in forma pauperis* statute. See *In re Garland*, *supra*, 428 F. 2d at 1186-1187; *In re Smith*, 323 F. Supp. 1082, 1084-1085 (D. Col.); *Application of Ottman*, 336 F. Supp. 746 (E.D. Wisc.).

CONCLUSION

For the foregoing reasons, the judgment of the district court holding the mandatory filing fee provisions of the Bankruptcy Act unconstitutional as applied should be reversed.

Respectfully submitted.

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JUNE 1972.

APPENDIX

The Bankruptcy Act, 11 U.S.C. 1 *et seq.*, provides in relevant part:

Section 14(b), 11 U.S.C. 32(b):

(b)(1) The court shall make an order fixing a time for the filing of objections to the bankrupt's discharge * * * which * * * shall be not less than thirty days * * * after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94(d) of this title * * * [If the examination of the bankrupt concerning his acts, conduct, and property has not or will not be completed within the time fixed for the filing of objections to the discharge the court may, upon its own motion or upon motion of the receiver, trustee, a creditor, or any other party in interest or for other cause shown, extend the time for filing such objections.]

(2) Upon the expiration of the time fixed in the order * * * or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this title have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States Attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

Section 14(c) (8), 11 U.S.C. 32(c) (8):

The court shall grant the discharge unless satisfied that the bankrupt has * * * (8) has failed to pay the filing fees required to be paid by this title in full * * *.

Section 40(c) (1), 11 U.S.C. 68(c) (1):

(c) (1) Except as otherwise provided in this title, there shall be deposited with the clerk, at the time the petition is filed in each case, and at the time an ancillary proceeding is instituted, \$37 for each estate for the referees' salary and expense fund, as herein below established: *Provided, however,* That in cases of voluntary bankruptcy such fee, as well as the filing fees of the clerk and trustee, may be paid in installments, if so authorized by General Order of the Supreme Court of the United States.

Section 48(c), 11 U.S.C. 76(c):

The compensation of trustees for their services, payable after they are rendered, shall be a fee of \$10 for each estate, deposited with the clerk at the time the petition is filed in each case, except where installment payments may be authorized pursuant to section 68 of this title * * *.

Section 52(a), 11 U.S.C. 80(a):

(a) Clerks shall charge and collect for their services to each estate, whether in a court of primary or ancillary jurisdiction, a filing fee of \$3. The clerk may collect this amount in installments when such installment payments have been authorized by General Order of the Supreme Court of the United States.

Section 59(g), 11 U.S.C. 95(g):

(g) A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of parties, until after notice to the creditors as provided in section 94 of this title, and to that end the court shall, upon entertaining an application for dismissal, require the bankruptcy to file a list, under oath, of all his creditors, with their addresses, shall cause such notice to be sent to the creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard. If the bankrupt shall fail to file such list within the time fixed by the court, such list may be filed by the petitioning creditors according to the best of their knowledge, information, and belief: *Provided, however,* That in the case of a dismissal for failure to pay the costs of the bankruptcy proceedings, such notice of dismissal shall not be required.

Supreme Court *General Order in Bankruptcy* No. 35(4) provides:

(4) The petition in a voluntary proceeding under Chapters I to VII or Chapter XIII of the Act may be accepted for filing by the clerk if accompanied by a verified petition of the bankrupt or debtor stating that the petitioner is without and cannot obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth

the terms upon which the petitioner proposes to pay the filing fees.

a. At the first meeting of creditors or any adjournment thereof, the court after hearing and examination of the bankrupt or debtor, shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original petition; provided, however, that for cause shown the court may extend the time of payment of any installment for a period not to exceed three mnths.

b. Upon the failure of a bankrupt or debtor to pay any installment as ordered, the court may dismiss the proceeding for failure to pay costs as provided in Section 59(g) of the Act. If a proceeding is dismissed or closed without the payment of the filing fees in full, the amount collected in installments, including any payment made at the time the original petition is filed shall be divided between the clerk, the referees' salary fund, the referees' expense fund and the trustee, if any, in the same proportion as such filing fees would be distributed if paid in full.

c. No proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full.

